

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 14 April 2003

CASE NO: 2003-ERA-2

In the Matter of

PATRICK J. BOYLES,
Complainant

v.

FLORIDA POWER & LIGHT,
Respondent

RECOMMENDED ORDER OF DISMISSAL

On October 2, 2002, Complainant Patrick J. Boyles filed with the Office of Administrative Law Judges (OALJ), an appeal of the determination made by the Assistant Secretary for the Occupational Safety and Health Administration (OSHA) that Respondent did not violate Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851. Complainant now seeks to voluntarily withdraw his complaint. Based on the reasons set forth below, I recommend that his request be granted.

I. Procedural History

This case was originally set for hearing on November 12, 2002, in Orlando, Florida. Subsequent to my issuance of the notice scheduling the hearing, I received a request for continuance from Complainant, who was *pro se*, to allow him additional time to obtain discovery and engage the services of an attorney. Respondent joined in Complainant's request for postponement of the hearing and asked that a prehearing conference be scheduled as soon as possible.

On November 5, 2002, I granted the parties' request for a continuance and instructed them to confer with each other regarding a mutually agreeable date and time for a prehearing conference. A November 12, 2002, telephone conference was thereafter scheduled but cancelled after Complainant notified me that he would refuse to commit to any date or location for a hearing until such time as he was able to retain counsel to represent him.

Given Complainant's statement that he would not make any commitment regarding further scheduling of a hearing, I issued an order cancelling the telephone conference. I notified Mr. Boyles in my order that I would continue this matter for forty-five days to allow him time to find an attorney.

On January 3, 2003, having heard nothing further from Complainant, I scheduled a status conference to determine whether he had obtained counsel and was prepared to proceed with a hearing on the merits. During a January 14, 2003, telephone conference, Mr. Boyles informed me that he had not yet found an attorney to represent him. He stated, however, that he had been in touch with attorneys who seemed interested in his case and requested additional time to confer with them regarding representation. Respondent was not opposed to a further continuance inasmuch as one of its witnesses had experienced a medical problem which would render the witness unavailable until around the end of March 2003. The parties agreed during the conference to a tentative hearing date of March 31, 2003. Another status conference was scheduled for February 14, 2003 to confirm that the parties would be prepared to proceed to hearing on March 31.

On February 11, 2003, Mr. Boyles sent to me via facsimile a lengthy letter in which he made various allegations relating to his termination by Florida Power & Light. Complainant further stated that, due to the demands of his current job, he did not have time to participate in either the status conference scheduled for February 14, 2003, or the formal hearing tentatively scheduled for March 31, 2003. I therefore cancelled the status conference and ordered Mr. Boyles to show cause within thirty days why his complaint should not be dismissed based on his unwillingness or inability to prosecute his claim.

On March 7, 2003, Florida Power & Light filed a motion for summary decision. Respondent's motion was accompanied by a statement of undisputed material facts, as well as a variety of documents supporting the motion. These documents included the transcript of an August 2002 arbitration hearing held in connection with Complainant's termination from Florida Power & Light, exhibits admitted into evidence during the arbitration hearing, and sworn affidavits of Florida Power & Light employees Gregg Carlisle, Mitchell S. Ross, and Dr. Luis J. Rodriguez.

On March 12, 2003, I issued an order directing Mr. Boyles to show cause why Respondent's motion for summary decision should not be granted. In my order, I recited for Complainant's benefit the applicable regulations pertaining to such motions and directed that he respond to the motion within twenty days of the date upon which the show cause order was issued.

On March 14, 2003, I received from Mr. Boyles a letter in which he described, *inter alia*, his many frustrations in attempting to find an attorney while trying to meet his obligations to his family and his new employer. On March 19, 2003, I received from Mr. Boyles another letter in which he informed me that he was unable to obtain time off from work to pursue this litigation, and he therefore wished to withdraw his appeal. In yet another letter from Mr. Boyles, received April 1, 2003, Complainant reiterated his request that his appeal be withdrawn.

II. Discussion

The ERA and its implementing regulations are silent with respect to a complainant's right to voluntarily withdraw his appeal. Similarly, there is no provision in Part 18 of 29 C.F.R. governing voluntary dismissal. Under these circumstances, I must rely on the Federal Rules of Civil Procedure in deciding whether to grant Mr. Boyles' request. 29 C.F.R. §18.1(a).

According to Fed. R. Civ. P. 41(a), an action may be dismissed voluntarily by a plaintiff without order of court. Such dismissal is without prejudice, except that the notice of dismissal operates as an adjudication upon the merits if the plaintiff has previously dismissed an action based on the same claim. Dismissal may be accomplished under the rule by filing a notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment. Fed. R. Civ. P. 41(a)(1)(i). The rule further permits voluntary dismissal based on a stipulation of dismissal signed by all parties to the action. Fed. R. Civ. P. 41(a)(1)(ii). Since Respondent has both answered Mr. Boyles' complaint *and* filed a motion for summary decision, subsection (i) of the rule clearly does not apply. Subsection (ii) of the rule is also inapplicable since no stipulation of dismissal signed by the parties has been filed.

When subsection 41(a)(1) does not apply, dismissal requires an order from the court setting forth such terms and conditions as the court deems proper. Fed. R. Civ. P. 41(a)(2). Unless otherwise specified in the court's order, dismissal under subparagraph (b) of the rule is without prejudice. Because a dismissal with prejudice prevents a complainant from reinstituting a case, *Ball v. City of Chicago*, 2 F.3d 752, 757-59 (7th Cir. 1993), it is not a sanction to be imposed lightly.

Rulings with respect to Fed. R. Civ. P. 41(a)(2) must consider: (1) whether to allow dismissal; (2) whether the dismissal, if permitted, should be with or without prejudice; and (3) if dismissal is granted without prejudice, whether any terms and conditions should be imposed. *Nolder v. Raymond Kaiser Engineers, Inc.*, 84-ERA-5 (Sec'y June 28, 1985) slip op. at 5 citing *Spencer v. Moore Business Forms*, 87 F.R.D. 118 (1980); *see also Stokes v. Pacific Gas & Electric Co.*, 84-ERA-6 (Sec'y July 26, 1988) slip op. at 2. In making these determinations, the court must be cognizant of the rule that dismissal without prejudice should be granted unless the adverse party will suffer some legal harm. *Ibid*. Dismissal with prejudice is a very severe sanction since it bars a plaintiff from ever prosecuting another action based on the same cause, either in federal or state court. *Nolder, supra*, slip op. at 7.

Regarding the first consideration described in *Nolder*, Mr. Boyles has requested that he be allowed to voluntarily withdraw his claim. Respondent has not opposed this request.¹ Absent

¹ Mr. Boyles' initial request to withdraw his complaint was filed March 19, 2003. Under our rules of procedure, Respondent had ten days within which to respond to Complainant's request. 29 C.F.R. §18.6(b). Adding five days for service of the request to withdraw by mail, 29 C.F.R. §18.4(c), Respondent's response to the request was due April 3, 2003. As of the date of

some evidence that Florida Power & Light would be legally prejudiced by such dismissal, an order granting Complainant's request would therefore seem appropriate.² No evidence of legal prejudice is evident in the record before me.

With regard to whether dismissal should be with or without prejudice, I see nothing in the record to suggest Respondent would be harmed by dismissing this action without prejudice. For example, there is no evidence that Complainant is simultaneously pursuing litigation in another court predicated on his termination from Florida Power & Light and that Complainant's request is predicated on forum shopping. Nor is there evidence to suggest that dismissal of Mr. Boyles' complaint here will create some tactical advantage for him elsewhere. Indeed, given the requirements associated with filing whistleblower complaints under the ERA, even if his present complaint is dismissed without prejudice, Mr. Boyles would be precluded from filing another complaint with the Department of Labor based on the same facts presented here.³ In light of the reasons given by Complainant for ending this litigation, i.e., his inability to find legal representation and to take time off from work to pursue this case, it seems unlikely that he will institute further legal proceedings elsewhere if dismissal without prejudice is granted. Dismissal of the complaint without prejudice thus appears appropriate in this case.

Finally, as noted above, Respondent has not responded to Complainant's request to withdraw his complaint and consequently has proposed no terms or conditions for dismissal which might be warranted under the facts of this case. Although payment of certain costs and attorneys fees is often a condition for granting voluntary dismissal without prejudice, such a condition is not required. *Brown v. Holmes & Narver*, 90-ERA-26 (ALJ Dec. 19, 1990) slip. op. at 2. I see nothing in the record to justify requiring Complainant to pay Respondent's costs and attorney fees in this case. There is no evidence that Mr. Boyles' complaint is either frivolous or that it was brought in bad faith. Similarly, there is no evidence that he has caused Respondent to incur unnecessary legal fees or costs by failing to cooperate in discovery. Nor, for that matter, is there evidence to suggest that Complainant would have the financial ability to pay attorney fees or expenses even if ordered to do so. Given Respondent's failure to object to Mr. Boyles' request to withdraw his complaint, or to suggest terms or conditions for withdrawal, none are recommended in this case.

this recommended decision, no response to Mr. Boyles' request to withdraw has been received from Respondent.

² As the Secretary noted in *Nolder*, "legal prejudice . . . does not result simply when [a respondent] faces the prospect of a second lawsuit or when [the complainant] merely gains some tactical advantage." *Nolder, supra* at 6 quoting *Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982).

³ Dismissal of a complaint without prejudice does not toll the statute of limitations, and any new complaint would be untimely if filed more than thirty days from the occurrence of an alleged violation.

RECOMMENDED ORDER

For the reasons set forth above, it is recommended that the complaint of PATRICK J. BOYLES against FLORIDA POWER & LIGHT under § 211 of the Energy Reorganization Act be DISMISSED WITHOUT PREJUDICE.

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STEPHEN L. PURCELL
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge, *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).